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JAMES D. MA

Supreme Court of the United States

THE JOHN CHURCH COMPANY,
Petitioner,

against

HILLIARD HOTEL COMPANY and
HENRY DE MARTINI.

No. 438

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

This is a writ of certiorari, issued by this Court to the Circuit Court of Appeals for the Second Circuit, for the review of its decree affirming a decree of the District Court of the United States for the Southern District of New York, which dismissed the complaint of the petitioner.

The action was brought under the Copyright Act to enjoin the Hilliard Hotel Company and Henri de Martini from performing in the dining room or any other part of the Hotel Vanderbilt, in the Borough of Manhattan, City of New York, the musical composition entitled "From Maine to Oregon."

The facts were stipulated as follows: The petitioner is the proprietor of an original musical composition by John Philip Sousa, entitled "From Maine to Oregon," which was duly copyrighted and

published, and the copyright whereof was duly assigned to the petitioner (Rec., fols. 22, 23).

The Hilliard Hotel Company is the proprietor of the Hotel Vanderbilt, and Henry de Martini is the leader of an orchestra engaged by said Hilliard Hotel Company, and is paid by it for services rendered in conducting an orchestra consisting of musicians, also paid by said company to furnish music in the dining room for the entertainment of its guests, no charge being made for admission to the dining room or for the privilege of hearing such performance (fol. 24).

On the 27th day of May, 1914, the said composition "From Maine to Oregon" was, without the petitioner's consent, performed by such musicians, under such leadership, in the dining room of the Hotel Vanderbilt, in the presence and for the entertainment of the guests thereof, and by the authority and consent of the defendant corporation, and the defendants intended to give future performances of such copyrighted composition (Rec., fols. 24-25).

The bill of complaint prayed for the granting of an injunction against such future performances (Rec., fols. 5-6) upon the contention that they constituted a violation of petitioner's right under the Copyright Act.

The cause coming on for trial at an Equity Term of the Court, the complaint was there dismissed (Rec., fols. 26-27), and such decree was affirmed on appeal (Rec., fol. 36).

POINTS.

I.

The performance complained of was a public performance.

This has been heretofore conceded in the proceedings under review, just as in *Brady* v. *Daly*, 175 U. S., 148, it was assumed that a performance on the stage was a public performance.

A hotel or inn is a public house, a place of public entertainment.

See:

Black's Law Dictionary, tit. "Hotel."

> "An inn-keeper, *as one carrying on a public employment*, is obliged to receive all travellers who properly apply to be admitted, provided he has room and they pay his reasonable charges."

22 *Cyc.*, 1074, and cases there cited.

See, also:

People v. *Jones*, 54 Barb. (N. Y.), 311.
People v. *Drum*, 127 App. Div. (N. Y.), 241, 242.

Under the law, then, a performance at a hotel is more properly characterized as *public* than that at a theatre, since admission to the former must be permitted to any proper applicant, while as to the latter a ticket of admission constitutes merely a revocable license.

Collister v. *Hayman*, 183 N. Y., 250.

II.

The performance complained of was a performance for profit within the purview of the Copyright Act.

The Copyright Act of March 4th, 1909, provides:

> "Sec. 1: That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:
>
> (e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit."

It is elementary that at common law a composer had, prior to publication, the exclusive right to perform his own composition, and since the Copyright Act, in so far as it limits this right, is in derogation of the common law, it must be strictly construed as against such limitation; hence the expression therein of the term "*for profit*" must be given its widest scope for the protection of the composer.

> "As giving effect to what may be considered the inherent right of an author in his own work, the provisions of the copyright acts should receive a liberal construction."
>
> 9 *Cyc.*, 897, and authorities there cited.

> "The copyright act in my opinion should be liberally construed, with a view to protect the just rights of authors and to encourage literature and art."
>
> *Ford* v. *Charles E. Blaney Amusement Co.*, 148 Fed. Rep., 642, 644.

See, also:

Werckmeister v. *American Lithographic Co.*, 142 Fed. Rep., 827.

An examination of the copyright laws of most countries shows that they afford a protection to the composer of a dramatic or dramatico-musical composition to the fullest extent by granting him the exclusive right to any public performance.

Thus it is provided in the *German Empire* by the Act of June 19th, 1901, as amended May 22nd, 1910, Article II, Section 11:

> "The author of a play or musical composition has also the sole right publicly to perform it";

and by the Copyright Act of *Austria,* Chapter II, Section 31:

> "The authorship of a musical composition embraces the right * * * to publicly perform."

Belgium Codes Law of March 22nd, 1888, provides:

> "Sec. c: Authors' rights upon Musical Compositions, Article 16: No Musical work can be publicly performed or executed in whole or in part without the consent of the author."

Switzerland Federal Law upon authors' rights upon works of art or literature, passed April 28, 1883, provides:

> "The sale of public rights of a dramatic or musical work do not include in itself the sale of performing rights. The author of said

> work has the right to make special conditions as to public performing rights should he mention a reservation to that effect."

In *France* a proceeding was brought in the Correctional Tribunal of Nice by certain members of the Society of Authors against Emile Gompel, manager of the Imperial Hotel, at Nice, for an infringement of a composer's right by performing a musical composition at his hotel, and judgment was there rendered on March 28th, 1906, which condemned the defendant to a fine of 50 francs and damages in the amount of 300 francs, besides costs. Upon appeal this judgment was affirmed, on June 14th, 1906, by the Court of Appeals of Aix Bouches du Rhone.

In this country the Copyright Law, prior to 1897, did not protect a copyright owner of a musical composition from the public performance thereof, but by the Act of January 6th, 1897, Section 4966 of the Revised Statutes was amended by providing a penalty for "any person publicly performing or representing any dramatic or *musical* composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic or musical composition."

In the report (H. R. Rep., 2813, 54th Congress, 2nd Sess.) made to the House of Representatives on this bill it was stated:

> "The purpose of the proposed measure is twofold: First to secure to musical compositions the same measure of protection under the Copyright Law as is now afforded to productions of a strictly dramatic character. Secondly, for added means for the protection of authors of dramatic and operatic works."

And this Court, referring to that amendment, said:

> "The purpose of the amendment evidently was to put musical compositions on the footing of dramatic compositions so as to prohibit their public performance."
>
> *White-Smith Music Pub. Co.* v. *Apollo*, 209 U. S., 1, 16.

So that by that amendment the exclusive right to perform publicly was reserved to the copyright proprietor, and any public performance without his consent constituted an infringement, whether such performance were given for profit or not. And in respect of a copyrighted drama, this exclusive right to perform publicly is continued without qualification by the Act of 1909, Section 1 (d). This course of legislation evidences an extreme degree of caution on the part of Congress in determining to what extent the common-law rights of an author or composer should be abridged upon the grant of a copyright, and should be taken into consideration in the construction of the act.

Upon an interlocutory appeal in the present case the Circuit Court of Appeals expressed the opinion that "Congress seems to have meant by the words 'for profit,' a direct pecuniary charge for the performance, such as an admission fee, or a fee deposited in a coin-operated machine."

> *John Church Co.* v. *Hilliard Hotel Co.*, 221 Fed. Rep., 229, 231.

This ruling construes the statute strictly as against the copyright owner, rather than liberally in his favor, and also adds to the provision of the act a limitation against the rights of the composer, which not only is not expressed therein, but which

is contrary to the commonly accepted significance of the term "profit."

> "Profits are the advantages realized in money by the sale of property at a price exceeding the cost or the receipts of any enterprise or business exceeding the expense incident to it, and in this sense 'profits' and 'net profits' are for all legal purposes synonymous expressions * * *. The term 'profits' does not necessarily imply money but may include property other than money."
>
> 23 *Am. & Eng. Encyc. of Law* (2d ed.), pp. 189-191.

> "'Profits' generally mean the gain which is made upon any business or investment when both receipts and payments are taken into the account."
>
> *People ex rel. MacMaster & Harvey* v. *Board of Supervisors*, 4 Hill, 20 (N. Y.), at p. 23.

> "'Profit' is acquisition of gain above expenditures arising from some transaction or operation."
>
> *Cross* v. *Long Island Loan & Trust Co.*, 75 Hun (N. Y.), 533, at p. 534.

Mercantile ventures are ordinarily conducted upon the investment of money, not only for raw material and cost of manufacture, but also for rent, advertising, services in acquisition and distribution and other incidentals commonly termed "overhead" charges. The return upon the investment must reimburse all those items of expense before a profit is realized; each such expenditure enters into the computation upon which profit is based, and each such expenditure is made "*for profit.*"

The conduct of a hotel is no exception to the principle which controls all mercantile ventures. When a guest is charged so much for his room he pays not mere rent to the exclusion of all of the other elements which enter into the computation of the investment: when he pays for a meal his payment does not include merely the viands which he consumes to the exclusion of every other investment which is a part of the hotel enterprise. The guest in either event pays a share of the investment in, and profit upon, every incidental expenditure, whether or not required or enjoyed by him, and included in those returns is a reimbursement for the wages of every person employed by the hotel and an adequate profit thereon.

Since, then, the guest pays for the services of cooks, waiters, chambermaids and porters, all of which enter in the calculation of the hotelkeeper's investment, and upon all of which a profit is added by him, how can it be reasonably claimed that musicians who are hired for the entertainment of the guests are not paid for by them to the same extent as are the other servitors, or that the hotelkeeper does not charge a profit upon such expenditure upon the same principle and calculation which guide him as to every other part of his investment.

Clearly, the musical entertainment was part of the service furnished by the hotel, and the expenditure made for the payment of the musicians was an investment *for profit*, and the performance was, therefore, a public performance *for profit* and within the inhibition of the Copyright Act.

This is the view which was entertained by Judge LACOMBE, who, in granting a preliminary injunction in this case, said:

> "The circumstance that complainant could not prove any specific sum as 'profit' resulting from the playing of the copyrighted music seems to me immaterial. The place was 'public,' although all the public could not gather in it, and I think, as did the judges in *Sarpy* v. *Holland*, 99 L. T., 317, that the hotel would not have paid for the playing of the piece unless in some way or other they were to gain thereby."
>
> *John Church Co.* v. *Hilliard Hotel Co.* (U. S. D. C., S. D. N. Y., Aug. 13, 1914).

Sarpy v. *Holland & Savage*, 99 *Law Times* Reports, 317, was an action brought to restrain the infringement of a copyright granted under the Copyright Law of France and effective within the Kingdom of Great Britain, pursuant to the provisions of the International Copyright Convention, by the performance of a musical composition in the dining room of a hotel. The defendants alleged *inter alia* a license to perform under the following conditions appearing upon the face of the sheet of music which was utilized for the purpose of performance:

> "All rights of public performance reserved. This composition may be performed without fee at entertainments which are absolutely free, otherwise permission must be obtained from the Société des Auteurs, 32 Shaftesbury-avenue, London, W."

And:

> "This piece can be performed at private soirées and gratuitous public entertainments without fee or license."

And the questions raised upon the trial were as follows:

(a) Was the notice of reservation printed upon the published music in the French language sufficient for its protection?

(b) Did the license thus appearing upon the published music authorize a performance at a hotel where no admission fee was charged?

The complaint was dismissed in the first instance, but upon appeal to the Court of Appeals that judgment was reversed, the Appellate Court holding *inter alia*, per COZENS-HARDY, Master of the Records, pages 325-326:

> "The court having decided the point of law on the interpretation of the Copyright Act it was suggested that there was another issue which had not been tried in the court below —namely, whether a leave and license had not been given by the plaintiff or his predecessors to use the music in question. The license that was alleged was to perform the music at gratuitous public entertainments without fee or without a license. The learned judge in the court below took a view of the meaning of that license. In his view what took place at the Crown Hotel, as proved in the evidence, did not bring the case within the terms of the license, even assuming that the license had been given. Mr. Strachan asked that it might go back for a further trial upon that issue. It seemed to us that that would not be right unless we thought that, even assuming the license as pleaded to have been proved, it would suffice to save the defendant Savage from liability. We have heard argument upon that point. I feel no doubt whatever that the license does not justify what was done. This performance was paid for by Mr. Holland, the publican, with the view of gain; it was worth his while to pay, I think, 16s. a performance. It was obviously part of the means by which he attracted customers, and hoped to gain, and did gain a profit in carrying on the business of the hotel. That being so, it seems to me

> impossible to contend that this was a performance at a gratuitous public entertainment. Obviously the people who went in large numbers every night went there not merely in the expectation, but with the certainty that they would not go there, and indeed could not go there, without buying some of the commodities which Holland was there for the purpose of selling. The music was really part of the operations of the hotel; and the license cannot justify what was done."

A similar view was taken by the New York Supreme Court:

> "While no entrance fee is charged for this exhibition, it is evident that it is conducted for the purpose of drawing trade and of gathering people into the place to purchase soda or ice cream while viewing the pictures. A person who came in and occupied one of the chairs at a table, without ordering something, I imagine would not stay very long. *In this indirect way a profit is made out of the moving picture show.*"
>
> *Weisblatt* v. *Bingham*, 58 Misc. (N. Y.), 328.

If Congress had intended to limit the copyright owner's exclusive right to publicly perform to such performances only as were rendered for an admission fee or other direct payment, it could very readily have so provided by apt terms; that it had considered the subject of "admission fees" is apparent from the provision in Section 1 (e), that "the production or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit, unless a fee is charged for admission to the place where such a reproduction or rendition occurs," thus indicating

that in respect of other public performances the term "profit" was not to be restricted to performances for which an admission fee or other direct payment was charged.

The nature of the public performance which should not be deemed public performances for profit is indicated, if not fixed, by the exceptions which the statute provides.

Prior to this enactment the mechanical reproduction of a musical composition was not an infringement of the copyright thereon. By Section 1 (e) the copyright control is now extended to such mechanical reproduction, and the payment of royalties is secured to the copyright owner who has used or permitted the use of the copyright work upon the parts of instruments serving to reproduce mechanically the musical work. By the royalty so secured the copyright owner is compensated for such reproduction upon coin-operating machines. Consequently, notwithstanding such reproduction is obviously rendered for profit, it is provided by the act that it should not be deemed a public performance for profit, unless a fee is charged for admission to the place where such a reproduction or rendition occurs, thus indicating that the royalty was deemed a sufficient compensation upon the mechanical reproduction of a copyrighted musical work, unless an admission fee were charged, in which case the copyright owner was deemed entitled to be further compensated because of the additional profit derived from such admission fee.

Section 28 of the act provides "that nothing in this Act shall be construed as to prevent the performance of religious or secular works, such as oratorios, contatas, masses or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed or obtained from some public library, pub-

lic school, church choir, school choir or vocal society, provided the performance is given for charitable or educational purposes and not for profit." Thus, other than in case of reproduction upon coin-operated machines without admission fees, the only exceptions from the copyright control specifically provided by the act are in cases of performances for *charitable or educational purposes*, and this, we submit, indicates the underlying principle by which, according to the legislative intent, it shall be determined whether or not the performance is given for profit.

In the report made to the House of Representatives on this bill (H. R. Rep. No. 2222, 60th Congress, 2nd Sess.) reference is made to this portion of Section 28 as follows:

> "The existing law provides that any person publicly performing a dramatic or musical composition without the consent of the proprietor of the copyright shall be liable for damages of not less than $100 for the first and $50 for every subsequent performance, and this prohibition covers cases of public performances where the performance is not for profit. We have provided in this section that where the public performance is given by public schools, etc., for educational or charitable purposes, and not for profit, it may be done without subjecting those who give the performance to any suit for damages; and we further provide that the music used for the performance may be rented, borrowed, or obtained from public libraries or other public schools," etc.

If the term "for profit" is to be restricted to the case of an admission fee or direct payment, the way is easily opened for evasion of the statute by the

simple subterfuge of a charge for some service or commodity in connection with a public performance for which no admission is charged—a device by which anyone could with impunity publicly reproduce any copyrighted musical composition to his own profit, and in utter disregard of the copyright. The full measure of protection cannot be extended to the owner of the copyright, unless his control shall include every public performance given as a part of any enterprise undertaken for profit, and not coming within the exceptions provided; whether such profit be a direct return for the public performance, or a return upon the venture, to which the performance contributes, cannot be material, for it could not have been intended to give legislative sanction to any profit, direct or indirect, upon the public performance of a copyrighted musical composition without consent of the owner.

Whether the remuneration derived by a person from his services constitutes a profit, and so whether the musician in playing for hire performs for profit, need not be here determined. For when the paid musician participates with the hotel proprietor in rendering a public performance given by the latter for profit the musician is, equally with the hotel proprietor, an infringer of the copyright owner's exclusive right to perform publicly for profit.

Nor is it necessary here to consider the effect of a performance by a church, which, to some extent at least, is excepted by the proviso contained in Section 28 of the act. We are here concerned with a public performance given as a part of a commercial venture conducted for profit.

III.

The march "From Maine to Oregon" was a component part of the copyrighted dramatico-musical composition "The Glass Blowers," and the public performance thereof, whether for profit or not, without the consent of the petitioner was an infringement of the copyright.

Section 1 (d) of the Act of 1909 confers upon the copyright owner the exclusive right

> "to perform or represent the copyrighted work publicly if it be a drama * * * and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever."

It appears by the stipulated facts that the march "From Maine to Oregon" was an integral part of an original musical composition known as Lyric Comedy entitled "The Glass Blowers" (fol. 22); that the entire composition "The Glass Blowers" was duly copyrighted (fol. 23), and the copyright certificate for the entire composition (Exhibit B, fol. 10) describes it thus: "Musical composition entitled The Glass Blowers. A lyrical comedy. Book by Leonard Liebling. Music by John Philip Sousa. Vocal Score." The term "lyrical comedy" obviously describes the work as a dramatico-musical composition. True, the certificate classifies it generally as a musical composition, but by Section 5 of the Act, it is provided:

> "Nor shall any error in classification invalidate or impair the copyright protection secured under this act."

By Section 3 of the Act, it is provided:

> "That the copyright provided by this Act shall protect all the copyrightable compo-

> nent parts of the work copyrighted and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this Act."

Under the foregoing provisions it is clear that the copyright upon the entire composition "The Glass Blowers" extended to the march "From Maine to Oregon" as a component part thereof, and that by virtue of that copyright, the complainant had the exclusive right to publicly perform the march, and that any public performance thereof without its consent, whether for profit or not, constituted an infringement.

The separate copyright upon the march itself did not operate to abridge or impair the exclusive right of public performance already obtained by virtue of the copyright upon the whole composition. The certificate of the copyright of this march (Exhibit C, fol. 11) on its face indicates that the march is but a part of the entire composition "The Glass Blowers," and the published orchestration thereof (Exhibit A) contains the same reference. The obtaining of a separate copyright for the march as a part of the entire composition was evidently a mere precautionary measure in order to facilitate the separate publication and sale of the march, and, under the circumstances, it did not have the effect of taking the march out of the operation and protection of the copyright obtained upon the whole composition as a dramatico-musical work.

Section 6 of the Act provides:

> "That compilations or abridgements, adaptations, arrangements, dramatizations,

> translations or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this Act; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works."

Although this section may not have direct application, yet, by analogy, it would seem to follow that the copyright obtained upon this march as a separate work did not affect the force or validity of the copyright originally obtained upon the entire composition, and that, therefore, the public performance of the march without the consent of the petitioner, infringed the copyright, whether such performance was given for profit or not.

IV.

The judgment of the Circuit Court of Appeals should be reversed, and judgment directed for petitioner, as prayed for in the bill of complaint.

Respectfully submitted,

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